

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Reexamination of the Policy  
Statement on Comparative  
Broadcast Hearings

GC Docket No. 92-52

**COMMENTS OF NATIONAL  
BROADCASTING COMPANY, INC.**

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## SUMMARY

The criteria established in the 1965 Policy Statement are totally inappropriate in the comparative renewal context, where an incumbent licensee's past record of performance is the best indication of future service in the public interest. Only when an incumbent licensee does not deserve a renewal expectancy should the Commission take other "hypothetical" criteria into account. Even in the context of competing applications for new facilities, many of the criteria established in the 1965 Policy Statement no longer have meaning or relevance in today's broadcast marketplace and should be eliminated or substantially modified. Specifically, NBC argues that the integration, proposed programming and auxiliary power criteria should be eliminated, and the diversification criterion should be eliminated or, at minimum, changed to provide more meaningful evaluation of the number and type of other media properties an applicant owns, and the impact of such common ownership on diversity in the relevant local market.

Regardless of the Commission's ultimate disposition of criteria applicable to competing applicants for new facilities, it should declare as a matter of policy that such criteria will not be applied in comparative renewals unless and until the incumbent licensee is found not to deserve a renewal expectancy.

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National Broadcasting Company, Inc. ("NBC"), by its attorneys, files these Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-referenced proceeding.

I. INTRODUCTION

The purpose of this proceeding is to evaluate the efficacy of the criteria and processes the Commission uses to select among competing applicants for new broadcast facilities. As the incumbent licensee of six television

stations,<sup>1</sup> NBC's interest in this proceeding is focused on the application of these criteria to comparative renewal proceedings.<sup>2</sup>

NBC has repeatedly argued to the Commission that the criteria established in the 1965 Policy Statement are totally inappropriate in the comparative renewal context.<sup>3</sup> Whatever changes the Commission makes in those criteria as a result of this proceeding, it should continue to judge renewal applicants on the basis of their compliance with the Communications Act and the Commission's rules and policies, and on their past record of program service. Only when an incumbent licensee does not deserve a renewal expectancy should the Commission take other "hypothetical" criteria into consideration in deciding whether to grant the renewal or the competing application. Even in these situations, NBC submits

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<sup>1</sup> WNBC, New York; WRC-TV, Washington, D.C.; WMAQ-TV, Chicago; KNBC-TV, Los Angeles; KCNC-TV, Denver; and WTVJ, Miami.

<sup>2</sup> The Notice states that the Commission is not addressing the "distinct issues raised in comparative renewal proceedings." However, it asks for comment on the implications for comparative renewal proceedings of any revisions adopted. Notice at fn. 1; Par. 42 (n).

<sup>3</sup> See, e.g., NBC's November 14, 1988 Comments in response to the Second Further Notice of Proposed Rulemaking in BC Docket No. 81-742, 3 FCC Rcd 5179 (1988) (hereinafter "Second Further Notice").

that many of the criteria established in the 1965 Policy Statement no longer have meaning or relevance in today's broadcast marketplace and should be eliminated or substantially modified.

II. CRITERIA THE COMMISSION APPLIES TO COMPETING APPLICANTS  
FOR NEW BROADCAST FACILITIES SHOULD NOT BE USED IN  
COMPARATIVE RENEWAL PROCEEDINGS

A. In General The Criteria Established In The 1965  
Policy Statement Should Not Be Applied In  
Comparative Renewals

NBC submits that the criteria established in the 1965 Policy Statement should have no applicability in the comparative renewal context. Even if these criteria have some predictive value when the Commission is considering an applicant that has no record of actual operation of the station applied for, they have no relevance to a renewal applicant. "Hypothetical" criteria are neither needed nor useful where a licensee actually has been operating the station and has a record of past broadcast service. Actual past performance is a much better indicator of future performance than theoretical predictions based on whether a challenger claims its ownership and management will be integrated, its proposed program service, or how many other broadcast properties it owns.

Moreover, it is both unfair and contrary to achieving the best practicable broadcast service for the Commission to grant licenses, encourage investment in programming, equipment and personnel and then declare that such investment can be totally wiped out by a competing applicant who merely "promises to do better" than the incumbent, and happens not to own other media properties or has full-time participation by its owners.

A renewal applicant should be judged on its past record as a licensee. If an incumbent licensee qualifies for a renewal expectancy, it should prevail in any comparative renewal proceeding, even if the competing applicant would fare better than the incumbent licensee if they were both judged only under the "hypothetical" predictive criteria of the 1965 Policy Statement.

B. The Integration, Proposed Programming and Auxiliary Power Criteria Should Be Eliminated And, In Any Event, Should Not Be Applied In The  
Comparative Renewal Context

Several of the criteria set out in the 1965 Policy Statement purport to advance the Commission's goal of achieving the best practicable service to the public by helping the Commission to predict the quality of future broadcast service an applicant will provide. However, it is highly questionable whether such criteria as integration, proposed programming and auxiliary power can provide any

meaningful indication of the nature or quality of future service. On the other hand, litigation over these criteria has burdened and even undermined the Commission's comparative selection processes. NBC urges that these criteria be eliminated.

The 1965 Policy Statement presumes that an owner who participates in the day-to-day management of a station "inherently" would provide better service to the public than a non-integrated owner. However, as the Court pointed out in Bechtel v. FCC, the Commission has never explained why this should be the case.<sup>4</sup> In fact, there is no rational basis for concluding that an owner/manager will be more sensitive to community needs and interests, or better able to address them, than an experienced professional manager of a station. Moreover, as the Bechtel court notes, the integration criterion creates an incentive for competing applicants to fashion business arrangements that are at worst "shams" and at best "strange and unnatural" in order to obtain a "substantial plus" in a comparative proceeding.<sup>5</sup>

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<sup>4</sup> Bechtel v. FCC, No. 91-1112, D.C. Cir. 1992, Slip Op at 12.

<sup>5</sup> Id. at 13-14.



The integration criterion has no empirical basis and, in fact does not reflect the way in which stations that provide exemplary service to their communities are managed today.<sup>6</sup> It should be eliminated.<sup>7</sup>

The Commission should also eliminate the proposed program service and auxiliary power criteria. Program proposals made in the comparative licensing process are, as the Commission implies in the Notice (par. 17), often not worth the paper they are written on. Litigation over applicants' promises about their future programming efforts usually complicates and prolongs the comparative hearing process. Moreover, evaluation of and reliance on these proposals can lead to inappropriate Commission judgments on program content. NBC

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<sup>6</sup> It is the quality of management, not its identity, that has relevance to the public interest. Therefore NBC does not endorse the suggestion that comparative applicants receive a credit for the use of professional management, a proposal which appears designed to offset the integration criterion. Notice at par. 42(c).

<sup>7</sup> The Commission could retain the minority ownership preference as a separate comparative criterion if the integration criterion is eliminated. NBC believes that minority "owners" should have some degree of equity participation in the applicant before a preference is awarded. Similarly, we believe that the so-called Anax doctrine should be altered to require owners who wish to rely on criteria such as minority or female ownership or diversification to have some minimum level of investment or equity in the applicant.

urges the Commission to eliminate the proposed programming criterion. Similarly, we urge the elimination of the auxiliary power criterion for the reasons the Commission articulates in the Notice (par. 19).

If the Commission decides to retain any of these criteria in some form for comparative proceedings involving new facilities, it should state, as a matter of policy, that they will not be applied in comparative renewal situations. Once an incumbent licensee is found to have sufficiently served its community to earn a renewal expectancy, it is totally irrelevant whether it did so with owner/managers or professional managers. A licensee that deserves a renewal expectancy should not be "compared" to a challenger that merely claims it can better serve the community through owner/manager integration or paper program proposals -- "promises to do better" that, unlike past licensee performance, are of no value in predicting which applicant will in fact be more responsive to the local community.

C. The Diversification Criterion Should Not Be Applied In Comparative Renewals And Should Be Modified In The Context Of Applications For New Facilities

NBC believes the diversification criterion is of no relevance in comparative renewals and only of limited relevance in the new facilities context. Both the Commission and the courts have recognized that pursuit of the maximum

diversity of media ownership may not always be consistent with the goal of providing the public with the best practicable broadcast service.<sup>8</sup>

Eight years ago, when it relaxed its multiple ownership rules, the Commission questioned the relevancy of national ownership restrictions to the goal of providing diverse program sources and viewpoints in local markets.<sup>9</sup> The Commission has also recognized that group ownership affords licensees efficiencies and economies of scale that may actually promote diverse and independent programming.<sup>10</sup> As the Commission's Office of Plans and Policy recently noted:

In today's market...common ownership of larger numbers of broadcast stations nationwide...may permit exploitation of economies of scale and reduce costs or permit improved service. (Working Paper #26: Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4103 (1991)).

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<sup>8</sup> See, Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 17 (1984); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 781-82 (1978).

<sup>9</sup> Amendment of Multiple Ownership Rules, supra, 100 FCC 2d at 19.

<sup>10</sup> Id. at 38.

In fact, the Commission has noted that "group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions," and that group owned stations broadcast more issue-oriented programming than non-group owned stations.<sup>11</sup>

The Commission is in the process of reevaluating virtually all its broadcast ownership rules in light of the proliferation of broadcast stations and competing media.<sup>12</sup>

In light of these findings and conclusions, NBC seriously questions the relevancy and value of the diversification criterion in determining which applicant, even for new facilities, will provide better service as a local licensee. If, however, the Commission believes judicial precedent does not allow complete elimination of the diversification criterion,<sup>13</sup> NBC certainly agrees with the suggestion in the

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<sup>11</sup> 100 FCC 2d at 20.

<sup>12</sup> Revision of Radio Rules and Policies, FCC 92-97 (adopted March 12, 1992); In re Review of the Commission's Regulations Governing Television Broadcasting, MM Docket 91-221 (adopted May 14, 1992).

<sup>13</sup> Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 56 (D.C. Cir. 1978)

Notice that the diversification factor be substantially modified. Ownership of media in markets other than the one in which the new facility will be located should be of no significance. Ownership of media in the same market as the new facility applied for should be a factor of differing weight, depending on the nature of the facility the applicant owns and the number and type of competing outlets in the community. Analysis of diversification factors in this manner will provide the Commission with a more rational assessment of the potential impact of the applicant's other media interest on diversity in the relevant market.

In the comparative renewal context, NBC reiterates the points it made above vis-a-vis the integration criterion: there should be no "hypothetical" criterion that assumes a challenger will provide better service than an incumbent simply because the challenger owns fewer media outlets. Indeed, as the Commission's analysis of the benefits of group ownership indicates, precisely the opposite is the more likely case.

In the Second Notice of Proposed Rulemaking in the pending docket on comparative renewals, the Commission stated:

...it does not appear to be equitable to penalize an incumbent who has performed well during its license term merely because that licensee has other media interests where the incumbent's other media interests are in compliance with all applicable ownership rules and policies and have, therefore, been considered to

be consistent with the public interest. (Second Further Notice, supra, 3 FCC Rcd at 5189).

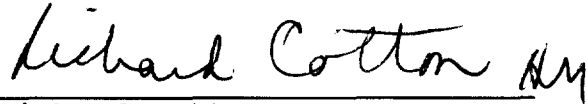
NBC completely agrees that it is neither fair nor rational for the Commission to, in effect, use the comparative renewal process to second guess either its past decisions granting license applications or its general policies on media ownership. A licensee that earns a renewal expectancy and is in full compliance with the Commission's ownership rules is entitled to a renewal grant. Giving such an incumbent licensee comparative demerits on criteria such as diversification does nothing to assure the public will receive the best practicable broadcast service. Instead it discourages investment in local stations and undermines the stability of the broadcast industry.

### III. CONCLUSION

For the foregoing reasons, NBC urges the Commission to eliminate the integration, proposed programming and auxiliary power criteria, and to substantially modify the diversification criterion. Regardless of the Commission's ultimate disposition of these criteria, it should declare as a matter of policy that the comparative criteria applicable in situations involving applications for new broadcast facilities will not be applied to comparative renewals unless and until

the incumbent licensee is found not to deserve a renewal expectancy.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard Cotton" followed by a small mark that appears to be "NY".

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